Supreme Court, U.S.
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90-1591

NO._____

In The
Supreme Court of the United States
October Term, 1990

IN RE: ELIZABETH HAYES LUCAS, *Debtor*
JANE B. FORBES, TRUSTEE,

Petitioner

vs.

HOLIDAY CORPORATION SAVINGS AND RETIREMENT PLAN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1) Is a Bankruptcy Debtor's interest in a Pension Plan covered by ERISA excluded from property of the estate under 11 U.S.C. §541(c)(2)?

2) If the Pension Plan is property of the estate, is the Debtor's interest in a Pension Plan exempt from the Bankruptcy Estate under 29 U.S.C. §1056(d)(1) [ERISA §206(d)(1)] or under 26 U.S.C. §401(A)(13) as "any property that is exempt under Federal Law" under 11 U.S.C. §522(b)(2)(A) or under Tennessee Exemption Statutes as set forth in Tenn. Code Ann. §26-2-112, Tenn. Code Ann. §26-2-104, and Tenn. Code Ann. §26-2-111(1)(D)?

LIST OF PARTIES

The parties to the proceedings below were the petitioner Jane B. Forbes, Trustee and the respondent Holiday Corporation Savings and Retirement Plan. Holiday Corporation is the parent corporation that established the Holiday Corporation Savings and Retirement Plan. Petitioner believes that Elizabeth Hayes Lucas has no interest in the outcome of this petition because Elizabeth Hayes Lucas did not participate in the proceedings below, but petitioner has served counsel for the probate estate of Elizabeth Hayes Lucas as well as counsel for the bankruptcy estate of Elizabeth Hayes Lucas.

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NO._____

In The
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October Term, 1990

IN RE: ELIZABETH HAYES LUCAS, *Debtor*
JANE B. FORBES, TRUSTEE,

Petitioner

vs.

HOLIDAY CORPORATION SAVINGS AND RETIREMENT PLAN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OPINIONS BELOW

The decision of the Court of Appeals for the Sixth District is reported at 924 F.2d 597, and is reprinted in the Appendix hereto, p. 1a, *infra.*

The decision of the Bankruptcy Court was affirmed by the United States District Court for The Middle District of Tennessee which is reported at 110 B.R. 335. It is reprinted in the Appendix hereto, p. 17a, *infra.*The decision of the United States Bankruptcy Court for the Middle District of Tennessee is reported at 100 B.R. 969. It is reprinted in the Appendix hereto, p. 19a, *infra.*

JURISDICTION

The decision of the Court of Appeals for the Sixth Circuit was dated and filed January 14, 1991. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED[1]

A. Bankruptcy Code Provisions.
11 U.S.C. §541 (Supp. 1986)
11 U.S.C. §522 (Supp. 1986)

B. ERISA Provisions.
29 U.S.C. §1056 (Supp. 1990)
29 U.S.C. §1144 (Supp. 1990)

C. Tennessee Statutory Provisions.
Tenn. Code Ann. §26-2-112 (1980)
Tenn. Code Ann. §26-2-104 (Supp.1978)
Tenn. Code Ann. §26-2-104 (Supp.1988)
Tenn. Code Ann. §26-2-111 (Supp.1980)

D. Internal Revenue Code Provisions.
26 U.S.C. §401(a)(13)(Supp.1986).

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1 The pertinent text is set forth in the Appendix in accordance with Rule 14.1(f) of the Rules of the Supreme Court of the United States.

STATEMENT OF CASE

Petitioner is the Trustee for the Bankruptcy estate of Elizabeth Hayes Lucas (the "Debtor") who filed a voluntary Chapter 7 Bankruptcy Petition on December 22, 1986. Holiday Corporation, one of the largest hotel/motel operators in the world, established and is also the Administrator of a savings and retirement plan for its employees, Holiday Corporation Savings and Retirement Plan, the Respondent.

The Debtor claimed an exemption of $2,000 in a retirement fund pursuant to Tennessee General Exemption statutes.[2] Upon investigation, the Trustee determined that Respondent administered the plan and that the Debtor's account consisted of funds which the debtor had contributed and the same were totally vested.

Respondent's Savings and Retirement Plan in effect at the time the Debtor's bankruptcy petition was filed allowed loans to the participants of the entire amount of the participants' account if the vested amount was $10,000.00 or less. All loans had to be adequately secured by an assignment of the participant's entire right, title and interest in the account. Further, the plan allowed for withdrawal of all of a participant's vested account when a participant: left the company, retired at or after age 55, or became permanently disabled. Leaving the company included voluntary termination.

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2 Tenn. Code Ann. §26-2-112, Tenn. Code Ann. §26-2-104, and Tenn. Code Ann. §26-2-111 (*see* p. 36a, *infra*.)

After being placed on notice of the bankruptcy and of Petitioner's interest in the Debtor's "vested" account, the Respondent proceeded to distribute to the Debtor $7,481.11 in three separate distributions over a 5 month period.

Respondent failed to notify the Bankruptcy Court or the Trustee of the disbursements or the proposed disbursements to the Debtor.

At the time the Debtor filed her Bankruptcy Petition, Tennessee had "opted" out of the Federal Exemption Scheme. Pursuant to the Tennessee Exemption Statutes a debtor could not exempt withdrawals from a pension, profit sharing, annuity, or similar plan if the debtor had the right to receive lump sum or periodic payments over a period of sixty (60) months or less.

Demand was made on the Debtor for turnover of the funds. Absent a response, the Trustee filed a Complaint for Turnover of the withdrawn funds. By virtue of being a core proceeding, original jurisdiction of the Bankruptcy Court was invoked pursuant to 28 U.S.C. §157(b)(2)(A)(E)(Supp. 1988) and Bankruptcy Rule 7001, *et seq.*

The thrust of Respondent's reply was that it should not be liable to the bankruptcy estate because of the holding in *Mackey v. Lanier, supra*, and/or general equitable principles. The Debtor did not answer or otherwise respond to the Complaint in the Bankruptcy Court. The matter was heard by the Bankruptcy Court on cross motions for summary judgment, briefs, exhibits, and arguments.

The Bankruptcy Court, Judge Lundin, stated: "It is conceded that the Holiday Corporation Savings and Retirement Plan is not a spendthrift trust under Tennessee Law..." See p. 21a *infra.* In its Order and Memorandum the Bankruptcy Court found the issues to be:

> (1) Whether *Mackey v. Lanier*, 486 U.S. _____, 108 S.Ct. 2182, 100 L.ed. 2d 836 (1988), upset the Chapter 7 Trustee's recovery of vested ERISA qualified pension benefits that are nonexempt under Tennessee or non-bankruptcy federal law; and
>
> (2) Whether a pension fund is liable for benefits paid to the debtor after notice of the estate's claim. See p. 19a, *infra.*

The Bankruptcy Court ruled that *Mackey* does not affect the trustee's right to nonexempt pension benefits and that the trustee could recover post-petition distribution from the debtor or the pension fund.

The Respondent appealed to the District Court. The jurisdiction of the District Court was authorized by 28 U.S.C. §158 and Bankruptcy Rule 8001, *et seq.* The Debtor did not participate in the appeal.

At the District Court level, Respondent asserted that distribution to the Debtor was made inadvertently. Additionally, Respondent raised four issues concerning ERISA qualified plans as related to 11 U.S.C. §541(c)(2) and Tennessee Exemption Statutes. Of the four issues raised at the District Court level, three had not been considered by the Bankruptcy Court.

The District Court affirmed the opinion of the Bankruptcy Court, incorporated and adopted the opinion and memorandum of the Bankruptcy Court. See p.18a, *infra.*

Respondent then appealed to the Sixth Circuit Court of Appeals. Jurisdiction of the Sixth Circuit was authorized by 28 U.S.C. §158. The same issues raised in the District Court were raised in the Circuit Court. Again, the Debtor made no appearance nor filed a Brief.

The Sixth Circuit stated that resort to the Legislative History of 11 U.S.C. §541(c)(2) was improper and irrelevant. Continuing, the Sixth Circuit determined that ERISA does constitute "applicable nonbankruptcy law" and that ERISA benefits which are subject to that Act's anti-alienation provision are excluded from the bankruptcy estate under §541(c)(2). See p. 8a, *infra.*

Conversely, by relying on Legislative History, however, the Sixth Circuit found that ERISA contains an enforceable transfer restriction that causes it to fall within the meaning of the term "applicable nonbankruptcy law". See p. 11a, *infra.*

The Sixth Circuit concluded by reversing and remanding the case to the District Court and/or the Bankruptcy Court to determine whether Respondent's Plan constitutes a pension plan within the meaning of ERISA. See p. 13a, *infra.*

REASONS FOR GRANTING THE WRIT

A)The decision of the Court of Appeals conflicts with decisions of other Courts of Appeals as well as with decisions in other Circuits.

The Ninth Circuit specifically held that anti-alienation and anti-assignment prohibitions in ERISA, 29 U.S.C. §1056(d)(1) and the Internal Revenue Code, 26 U.S.C. §401(a)(13) which were incorporated into a debtor's ERISA qualified pension and profitsharing plan did not create federal non-bankruptcy exemptions. Certiorari was denied by this Court. *See, Daniel v. Security Pacific National Bank, (In re Daniel) infra.* As herein set out, the Fifth Circuit, Eighth Circuit, Ninth Circuit and Eleventh Circuit follow this view.

Recently the Sixth Circuit in the present case held opposite to the Ninth Circuit, Fifth Circuit, Eighth Circuit and Eleventh Circuit. *See*, p. 1a, *infra*. The Sixth Circuit followed the Fourth Circuit in *Anderson v. Raine (In re Moore), infra.*

The commencement of a bankruptcy case under Title 11 of the United States Code creates an estate comprised of "all legal or equitable interest of the debtor in property as of the commencement of the case". 11 U.S.C. §541(a)(1). The general rule of 11 U.S.C. §541(a)(1) is qualified by U.S.C. §541(c)(2) which provides an exception for a restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law in a case under this title (Title 11 of the United States Code).

The term "applicable nonbankruptcy law" under 11 U.S.C. §541(c)(2) has been construed by a majority of the

courts presented with the issue to apply exclusively to state spend-thrift trust law. *See, e.g., Daniel v. Security Pacific Nat'l. Bank (In re Daniel),* 771 F.2d 1352 (9th Cir. 1985), *cert. denied,* 475 U.S. 1016, (1986); *Lichstrahl v. Bankers Trust (In re Lichstrahl),* 750 F.2d 1488 (11th Cir. 1985); *Samore v. Graham (In re Graham),* 726 F.2d 1268 (8th Cir. 1984); *Goff v. Taylor (Matter of Goff),* 706 F.2d 574 (5th Cir. 1983); *Matter of Tisdale,* 112 B.R. 61 (Bankr. D. Conn. 1990); *In re Velis,* 109 B.R. 64 (Bankr. D. N.J. 1989); *In re Burns,* 108 B.R. 308 (Bankr. W.D. Okla. 1989); *In re Alagna,* 107 B.R. 301 (Bankr. D. Colo. 1989); *Fogler v. Flindall (In re Flindall),* 105 B.R. 32 (Bankr. D. Ariz. 1989); *Matter of Herndon,* 102 B.R. 893 (Bankr. M.D. Ga. 1989); *In re Stansberry,* 101 B.R. 508 (Bankr. E.D. Tenn. 1989); *Heitkamp v. Dyke (In re Dyke),* 99 B.R. 343 (Bankr. S.D. Tex. 1989).

This result is reached with proper reliance upon the Legislative History to 11 U.S.C. §541(c)(2) which states that "[p]aragraph (2) of subsection (c)...preserves restrictions on transfer of a spendthrift trust to the extent that the restriction is enforceable under applicable nonbankruptcy law". H.R. Rep. 595, 95th Cong. 2d Sess. 369 (1977), reprinted in 1978 U.S. Code Cong. & Admin. News 5963, 6325.

This result is also reached by some courts, such as *Goff v. Taylor (Matter of Goff), supra* at 582, in reviewing the overall statutory scheme and the federal-state exemption elections, including 11 U.S.C. §522(b)(2)(A), 11 U.S.C. §522(d)(10)(E), and 29 U.S.C. §1144(a) and (d). The Fifth Circuit held that:

> It is well to make a final telling observation on the relationship between ERISA and the Bankruptcy Code. While ERISA preempts state law, 29 U.S.C.

> §1144(a), it clearly was not intended to affect the operation of other federal law. It provides: "Nothing in this [Act] shall be construed to alter, amend, modify, invalidate, impair, or supercede any law of the United States [except pre-existing federal pension law] or any rule or regulation issued under such law." 29 U.S.C. §1144(d). As we have already discussed, the Bankruptcy Code was, generally, intended to broaden the "property of the estate" available to creditors in bankruptcy and, specifically, intended to limit any exemption of pension funds. These policy-based provisions of the Code would be frustrated were ERISA's anti-alienation and assignment provisions applied with a sweeping brush. Thus, ERISA's specific provision precluding interference with the operation of federal law renders the Bankruptcy Code effective over any ERISA provisions to the contrary. *Goff v. Taylor (Matter of Goff), supra* at 586.

Some courts have further held that the phrase "applicable nonbankruptcy law" from 11 U.S.C. §541(c)(2) does not include 26 U.S.C. §401(a)(13). *See, e.g., Daniel v. Security Pacific National Bank (In re Daniel), supra* at 1360.

In following the majority view if a pension or retirement plan ("plan") fails to qualify as a spendthrift trust under applicable state law, the debtor's interest in the plan is included as property of the bankruptcy estate under 11 U.S.C. §541(a)(1) but not excluded under 11 U.S.C. §541(c)(2). If the plan qualifies as a spendthrift trust under applicable state law, the debtor's interest in the plan is excluded under 11 U.S.C. §541(c)(2).

The majority view is followed by the United States Courts of Appeal in the following Circuits:

5th Circuit

Goff v. Taylor (Matter of Goff), 706 F.2d. 574 (5th Cir. 1983).

8th Circuit

Samore v. Graham (In re Graham), 726 F.2d 1268 (8th Cir. 1984).

9th Circuit

Daniel v. Security Pacific National Bank, (In re Daniel), 771 F.2d 1352 (9th Cir. 1985).

11th Circuit

Lichstrahl v. Bankers Trust, (In re Lichstrahl), 750 F.2d 1488 (11th Cir. 1985).

In supporting the majority view, that 29 U.S.C. §1056(d)(1) and/or 26 U.S.C. §401(a)(13) are not "applicable nonbankruptcy law" under 11 U.S.C. §541 (c)(2), but rather limited to apply exclusively to state spendthrift trust law, a majority of trial courts have followed suit. *See, e.g., In re Conroy,* 110 B.R. 492 (Bankr. D. Mont. 1990); *In re Alagna,* 107 B.R. 301 (Bankr. D. Colo. 1989); *In re Toner,* 105 B.R. 978 (Bankr. D. Colo. 1989); *Heitkamp v. Dyke (In re Dyke),* 99 B.R. 343 (Bankr. S.D. Tex. 1989); *In re Gribben,* 84 B.R. 494 (Bankr. S.D. Ohio 1988); *In re Slezäk,* 63 B.R. 625 (Bankr. W.D. Ky. 1986); *Gilbert v. Osburn (In re Osburn),* 56 B.R. 867 (Bankr. S.D. Ohio 1986).

By contrast, the term "applicable nonbankruptcy law" under 11 U.S.C. §541(c)(2) has been construed by a minority of the courts presented with this issue to include

ERISA benefits which are subject to that act's anti-alienation provisions.

A minority view has been followed at the Circuit level in the following cases:

4th Circuit

Anderson v. Raine (In re Moore), 907 F.2d 1476 (4th Cir. 1990).

6th Circuit

The case before this Court is reported at 924 F.2d and is reprinted in the Appendix hereto, p. 1a, *infra.*

The minority view has been followed at the trial level in some additional cases. *See, e.g., In re Ralstin,* 61 B.R. 502 (Bankr. D. Kansas 1986); *Warren v. G.M. Scott & Sons (In re Phillips),* 34 B.R. 543 (Bankr. S.D. Ohio 1983); *Clotfelter v. CIBA - GEIGY Corp. (In re Threewith),* 24 B.R. 927 (D. Kan. 1982); *In re Komet,* 104 B.R. 799 (Bankr. W.D. Tex. 1989).

B)This area of the law is so unsettled that in the Eastern District of Tennessee, for example, Bankruptcy Judges are issuing decisions, then reversing themselves, and then being reversed again by successors.

The confusion in this area is typified by the Bankruptcy Courts for the Eastern District of Tennessee. Judge Clive Bare in a 1983 decision concluded that a restriction on a transfer of a beneficial interest of a Chapter 7 bankruptcy debtor in a qualified, employer-created, ERISA plan is enforceable under Federal nonbankruptcy law and exempted by 11 U.S.C. §541(c)(2). *Shults v. Rose's Stores, Inc. (In re Holt),* 32 B.R. 767, 772 (Bankr. E.D. Tenn.

1983). Judge Bare overruled his own decision in *Holt* less than a year later. *See, In re Ridenour,* 45 B.R. 72 (Bankr. E.D. Tenn. 1984). Judge Bare relied upon the decisions of *Goff v. Taylor (Matter of Goff),* 706 F.2d. 574 (5th Cir. 1983) and *Samore v. Graham (In re Graham),* 726 F.2d 1268 (8th Cir. 1984). Judge Bare's decision in *Ridenour* followed the majority view.

Subsequent to *Ridenour,* the Bankruptcy Judges in the Northern and Southern Divisions of the Eastern District of Tennessee followed the majority view, and consistently held that the term "applicable nonbankruptcy law" in 11 U.S.C. §541(c)(2) must be construed within the context of state spendthrift trust law. *See, In re Stansberry,* 101 B.R. 508 (Bankr. E.D. Tenn. 1989); *Brown v. Westvaco Corp. (In re Cassada),* 86 B.R. 541 (Bankr. E.D. Tenn. 1988); *In re Faulkner,* 79 B.R. 362 (Bankr. E.D. Tenn. 1987); *In re Elsea,* 47 B.R. 142 (Bankr. E.D. Tenn. 1985).

Cassada, supra, and *Elsea, supra,* are decisions of Chief Bankruptcy Judge Ralph H. Kelly of the Eastern District's Southern Division. *Stansberry, supra,* and *Faulkner, supra,* were decisions by Judge Richard Stair, Jr. (successor to Judge Clive Bare) sitting in the Eastern District's Northern Division. Judge Stair then issued the case of *In re Leamon,* 121 B.R. 974 (Bankr. E.D. Tenn. 1990), holding that a "governmental plan" qualified under I.R.C. §401(a) [26 U.S.C. §401(a)(13)] was excluded from the bankruptcy estate under 11 U.S.C. §541(c)(2) and expressly overruling that Court's decisions in *Stansberry, supra, Faulkner, supra,* and *Ridenour, supra,* for the proposition that the term "applicable nonbankruptcy law" under §541(c)(2) is limited exclusively to State Spendthrift Trust Law.

C)The lack of certainty between the relationship of the Bankruptcy Code and ERISA is an important issue of Federal Law which has not been, but should be, settled by this Court, as the current state of the law is promoting litigation and placing a burden on the Courts, Debtors, Trustees, and Plan Administrators.

Both the Bankruptcy Code 11 U.S.C. §101, *et seq,* and ERISA, 29 U.S.C §1001, *et seq,* are Federal Law and preemptive in their respective areas. As to the interplay and relationship between the Bankruptcy code and ERISA there is a great deal of disagreement. Several Courts have included in this interplay 26 U.S.C. §401(a)(13) which contains anti-alienation and anti-assignment clauses for qualified plans. Depending on the particular debtor, District of filing of a bankruptcy petition, state, and potential qualification or non-qualification of a pension or retirement plan with respect to either ERISA, the state exemptions, or federal exemptions, a trustee is constantly at peril for either not filing legal action to avoid an improper exception or exemption or for wrongfully objecting to a proper exception or exemption. Likewise a debtor or debtor's attorney is at peril for either claiming an exception or exemption which may be objected to or omitting to claiming an exception or exemption to which a debtor may be entitled.

Plan Administrators are at risk for either refusing to turn over funds to a bankruptcy estate, thereby precipitating litigation; or, agreeing to turn over funds to a bankruptcy estate and risking suit by the Debtor. Some Plan Administrators have raised the issue of potential disqualification of a plan and loss of tax exempt status by turnover of a Debtor's interest in a plan. Plan Administrators, like the Respondent, having hotels and

employees in each of the circuits, are not receiving uniform treatment under the Bankruptcy code and ERISA depending on the circuit in which the employee-debtor resides.

Cases being relied on by the Circuit Courts, District Courts, and Bankruptcy Courts as to interpretation of the scope and intent of ERISA and 11 U.S.C. §541(c)(2) have not dealt with the relationship of ERISA and the Bankruptcy Code. (*See General Motors Corporation v. Buha,* 623 F.2d 455 (6th Cir. 1980), and *Mackey v. Lanier, supra.*)

The atmosphere for spawning litigation in this area is great as evidenced by the numerous cases in the Bankruptcy Courts, District Courts, and Circuit Courts dealing with this issue. This is an important area concerning issues of Federal Law which should be settled. This Court needs to define the limits and interplay between ERISA, the Bankruptcy Code as related to the 11 U.S.C. §541(c)(2) exceptions and the 11 U.S.C. §522 exemptions, and the Internal Revenue Code at 26 U.S.C. §401(a)(13).

CONCLUSION

The Petition for a Writ of Certiorari should be granted to reconcile the conflict between the Circuits and to guarantee uniform treatment of ERISA qualified plans affected by a participant's bankruptcy filing, and the Order of the Court of Appeals reversed.

Dated: Pulaski, Tennessee, April 12, 1991.

Respectfully Submitted,

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APPENDIX

RECOMMENDED FOR FULL TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24
No. 89-6487

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

In Re: ELIZABETH HAYES LUCAS, *Debtor,*

JANE B. FORBES, Trustee, *Plaintiff-Appellee,*

v.

ELIZABETH HAYES LUCAS, *Defendant,*

HOLIDAY CORPORATION SAVINGS AND RETIREMENT PLAN, *Defendant-Appellant.*

On Appeal from the United States District Court for the Middle District of Tennessee;
Decided and Filed January 14, 1991,

DISPOSITION: REVERSED and REMANDED

COUNSEL:

James Flexer, Nashville, Tennessee, for Debtor.

Jane B. Forbes, Trustee, Franklin, Tennessee, Margaret M. Spencer, Forbes, McKelvey & Spencer, Franklin, Tennessee, for Plaintiff - Appellee.

C. William Denton, Argued, David J. Cocke, Borod & Kramer, Memphis, Tennessee, Charles W. Broun, III, Holiday Corporation, Memphis, Tennessee, for Defendant - Appellant.

JUDGES: Kennedy, Boggs and Suhrheinrich, Circuit Judges.

OPINION BY: SUHRHEINRICH

OPINION: Holiday Corporation Savings and Retirement Plan ("the "Plan") appeals the order of the district court holding that the debtor's interest in an employee benefit plan was property of the bankruptcy estate under 11 U.S.C. §541(a)(1) and was not excluded under the exception found at §541(c)(2). Section 541(c)(2) provides that a restriction on the transfer of a beneficial interest of a debtor in a trust that is enforceable under "applicable nonbankruptcy law" is enforceable under the Bankruptcy Code. We reject a narrow interpretation of the phrase "applicable nonbankruptcy law" in §541(c)(2) as protecting only those debtors' interests which also constitute traditional spendthrift trusts under applicable state law, finding that the plain unambiguous language of the statute encompasses federal law other than that arising under Title 11 as well as state statutory and case law. We therefore hold that a debtor's interests in an ERISA-qualified pension plan are not property of the debtor's bankruptcy estate and thus are not subject to turnover to the trustee in bankruptcy.

I.

The facts in this case are not in dispute.[1] On December 22, 1986, Elizabeth Hayes Lucas ("debtor") filed a petition for bankruptcy under Chapter 7 of the Bankruptcy Code. Jane B. Forbes, appellee, was appointed trustee ("trustee"). On the schedule of exempted property, debtor listed a $2,000 exemption in a retirement fund. Inquiries by the trustee revealed that debtor's retirement account was with her employer

Holiday Inn Corporation ("Holiday") and that the account was fully vested. As a benefit to employees, Holiday offers participation in a savings and retirement plan ("the Plan"). Debtor claims that the Plan is qualified as a defined contribution plan under Sections 401(a) and (k) of the Internal Revenue Code. It is further alleged that the Plan is subject to the provisions of Titles I, III and IV of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§1001-1461, and contains the anti-alienation clause required by ERISA at 29 U.S.C. §1056(d)(1).[2]

On April 20, 1987, Holiday provided the trustee with a copy of debtor's account statement, advising that $5,863.08 was vested as of January 1, 1987. During the period between April and August of 1987, debtor requested and received from Holiday, withdrawals of $1,500.00 on April 15, 1987, $1,161.13 on May 7, 1987, and $4,829.98 on August 24, 1987.

On or about April 15, 1987, the trustee filed a complaint for turnover of assets against the debtor and Holiday, seeking the portion of vested benefits disbursed to the debtor after the petition was filed. On cross-motions for summary judgment, the bankruptcy court stated that the debtor's pension benefits were not excluded from the bankruptcy estate and that the trustee could recover post-petition distributions from the debtor on the pension fund.[3] *Lucas,* 100 Bankr. at 971-72.

The bankruptcy court initially stated that it was conceded that the debtor's benefits plan was not a spendthrift trust under Tennessee law and was therefore property of the bankruptcy estate at filing on December 22, 1986. In reaching this conclusion, the bankruptcy court cited *In re Ridenour,* 45 Bankr. 72, 78 (Bankr. E.D. Tenn. 1984) and

In re Faulkner, 79 Bankr. 362 (Bankr. E.D. Tenn. 1987), both of which relied on a series of decisions which have interpreted the phrase "applicable nonbankruptcy law" in §541(c)(2) as protecting only those debtors' interests which constitute traditional spendthrift trusts under applicable state law. The bankruptcy court then found that the debtor's employee benefits were not subject to exemption[4] under Tenn. Code Ann. §26-2-111 because the debtor had access to vested benefits greater than those permitted by the statute.[5] Finally, the bankruptcy court held that the Supreme Court's decision in *Mackey v. Lanier,* 486 U.S. 825, 108 S. Ct. 2182 (1988), did not change this result.[6] The district court affirmed without separate opinion.

On appeal to this court, "the Plan" raises the following issues:

> 1) Whether the district court erred in concluding that debtor's vested pension benefits were property of the estate;
>
> 2) Whether the exception contained in Section 541(c)(2) applies only to ERISA-qualified pension plans which also constitute valid spendthrift trusts under relevant state law;
>
> 3) If Section 541(c)(2) is not to be so narrowly construed, whether the anti-alienation provisions contained in the Holiday Plan and required by ERISA are enforceable against the trustee; and
>
> 4) If Section 541(c)(2) is to be so narrowly construed, whether Tennessee law is preempted by ERISA as to what constitutes a spendthrift trust.

II.

Since the facts in this case are not in dispute and the issues presented involve purely legal questions, the only standard of review with which we need concern ourselves is that governing a bankruptcy court's conclusions of law. Such rulings by a bankruptcy court are subject to de novo review by this court. *United States v. Mississippi Valley Generating Co.,* 364 U.S. 520, 526, 81 S. Ct. 294, 297 (1961); *In re Caldwell,* 851 F.2d 852, 857 (6th Cir. 1988).

A.

The filing of a bankruptcy petition under Title 11 of the United States Code creates an estate comprised of "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. §541(a)(1) (West 1979 & Supp 1990). As the legislative history of this section makes clear, the provision was intended to be broad in scope. *United States v. Whiting Pools, Inc.,* 462 U.S. 198, 204-205, 103 S. Ct. 2309, 2313 (1983) (citing S. Rep. No. 95-989, p. 82 (1978); and H.R. Rep. No. 95-595, pp. 367-368 (1977)).

The Code further provides that "an interest of the debtor in property becomes property of the estate . . . notwithstanding any provision . . . (A) that restricts or conditions transfer of such interest by the debtor [.]" 11 U.S.C. §541(c)(1)(A) (West Supp. 1990). Paragraph 2 of subsection (c), however, states an exception to the general rule of §541(c)(1)(A): "A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under *applicable nonbankruptcy law* is enforceable in a case under this title." 11 U.S.C. §541(c)(2) (West Supp. 1990) (emphasis added). Thus,

property of a debtor falling within the definition of this exception is excluded from the bankruptcy estate.

The Plan contends that debtor's interest in the employee benefit plan are excluded from the bankruptcy estate because they are protected by an enforceable restriction on transfer under ERISA which constitutes "applicable nonbankruptcy law" under §541(c)(2) of the Bankruptcy Code. There is a split among the courts which have considered the issue of whether ERISA constitutes "applicable nonbankruptcy law." Several circuits have interpreted the phrase narrowly, relying on the section's legislative history to hold that §541(c)(2) was intended to refer only to state "spendthrift trust" law. *See In re Daniel,* 771 F.2d 1352, 1360 (9th Cir. 1985) *cert. denied*, 475 U.S. 1016 (1986); *In re Lichstrahl,* 750 F.2d 1488, 1490 (11th Cir. 1985); *In re Graham,* 726 F.2d 1268 (8th Cir. 1984); *Matter of Goff,* 706 F.2d 574 (5th Cir. 1983). Under this view, only those ERISA pension plans which qualify as spendthrift trusts under the applicable state law will be excluded from the property of the bankruptcy estate.

By contrast, a minority of courts have held that ERISA does constitute "applicable nonbankruptcy law", and thus ERISA benefits which are subject to that Act's anti-alienation provisions are excluded from the bankruptcy estate under §541(c)(2). Courts adopting this position have relied on the plain language of the statute, which on its face does not limit "applicable nonbankruptcy law" to state spendthrift trust law. These courts reason that the legislative history does not evidence an attempt by Congress to restrict the scope of §541(c)(2) to state spendthrift trust law, but simply reflects a ratification of a long-standing prior law honoring state spendthrift trust law. *See In re Moore,* 907 F.2d 1476 (4th Cir. 1990); *In re Majul,* 119 Bankr. 118

(Bankr. W.D. Tex 1990); *In re Threewitt,* 24 Bankr. 927 (D. Kan. 1982); *In re Komet,* 104 Bankr. 799 (Bankr. W.D. Tex. 1989); *In re Ralstin,* 61 B.R. 502 (Bankr. D. Kan. 1986); *In re Mosley,* 42 Bankr. 181 (Bankr. D.N.J. 1984); *Warren v. G.M. Scott & Sons,* 34 Bankr. 543 (Bankr. S.D. Ohio 1983); *see also In re Kincaid,* __F.2d __, No. 89-35342, (9th Cir. October 25, 1990) (Fletcher J. concurring).

It is an axiom of statutory construction that resort to legislative history is improper when a statute is unambiguous.

> Legislative history can be a legitimate guide to a statutory purpose obscured by ambiguity, but "[i]n the absence of a 'clearly expressed legislative intention to the contrary,' the language of the statute itself 'must ordinarily be regarded as conclusive.'" Unless exceptional circumstances dictate otherwise, "[w]hen we find the terms of a statute unambiguous, judicial inquiry is complete."

Burlington Northern R.R. v. Oklahoma Tax Comm'n, 481 U.S. 454, 461, 107 S. Ct. 1855, 1860 (1987) (citations omitted); see also *Davis v. Michigan Dep't of Treasury,* 489 U.S. 803, 808 n.3, 109 S. Ct. 1500, 1504 n.3 (1989). Similarly, this court has stated that

> [i]n determining the meaning of legislation, we must look to the plain language of the statute itself. If we find that the statutory language is unambiguous, then that language is regarded as conclusive unless there is a clearly expressed legislative intent to the contrary. If we find that the statute is ambiguous, we then look to its legislative history.

Bradley v. Austin, 841 F.2d 1288, 1293 (6th Cir. 1988) (citations omitted).

Applying this familiar principle, we find that the language of §541(c)(2) is clear and unambiguous and that the resort to the legislative history of §541(c)(2) as an interpretive tool is therefore inappropriate. Thus, we reject the position of those courts which rely on the legislative history to conclude that "applicable nonbankruptcy law" refers exclusively to state spendthrift law. In this regard, we are persuaded by the Fourth Circuit's recent decision in *Moore, supra,* which dealt with the same issue before us. In concluding that the debtor's interests in an ERISA-qualified profit sharing and pension plan were not subject to turnover because the Bankruptcy Code recognizes as dispositive the protection of an enforceable restriction on transfer under ERISA, the Fourth Circuit held:

> "Applicable nonbankruptcy law" means precisely what it says: all laws, state and federal, under which a transfer restriction is enforceable. Nothing in the phrase "applicable nonbankruptcy law" or in the remainder of §541(c)(2) suggests that the phrase refers exclusively to state law, much less to state spendthrift trust law.

Moore, 907 F.2d at 1477.

The Fourth Circuit based its decision on several factors. First, it noted that a narrow interpretation of the statute, in addition to violating the plain language of §541(c)(2), is also inconsistent with other uses of the identical phrase throughout the Bankruptcy Code, where the phrase is used to refer to the federal as well as state law. *Moore,* 907 F.2d at 1477.[7] The court reasoned that

because words are presumed to have the same meaning in all subsections of the same statute, *Moore,* 907 F.2d at 1478 (citing *Morrison-Knudson Constr. Co. v. Director, OWCP,* 461 U.S. 624, 633, 103 S. Ct. 2045 (1983)), it would be incongruous to give different constructions to an identical phrase at various sections of the Code, especially since the disparate parts of the statute were enacted together in a single comprehensive statute. *Moore,* 907 F.2d at 1478.

Second, the *Moore* court observed that other provisions of the Bankruptcy Code demonstrate that when Congress intended to refer to state law, it did so expressly. *Id.*[8] And, as noted in *Threewitt, supra*, since Congress did not use the term "spendthrift trust" in the language of the section itself, "there is no reason to suppose that when the term appears in the legislative history it should be taken as a term of art. . . ." 24 Bankr. at 929. *See also Ralstin, supra,* 61 Bankr. at 503 ("[I]f Congress had intended §541(c)(2) to apply only to state spendthrift trusts, the term 'spendthrift trust' would have appeared in the statute, rather than the phrase 'applicable nonbankruptcy law.'").

Finally, we also find, as did the Fourth Circuit, that even if the legislative history were relevant, it is inconclusive. *See Moore, supra,* 907 F.2d at 1479. The only place where the term 'spendthrift trust' is found is in the House and Senate reports. *See* H.R. Rep. No. 595, 95th Cong., 1st Sess. 176 (1977), reprinted in 1978 U.S. Code Cong. & Admin. News 5963, 6325 (stating that the term "applicable nonbankruptcy law" in §541(c)(2) "preserves the restrictions on transfer of a spendthrift trust to the extent that the restriction is enforceable under applicable nonbankruptcy law"); *and* S. Rep No. 989, 95th Cong. 2d Sess. 83, reported in 1978 U.S. Code Cong. & Admin

News 5787, 5869 (explaining that §541(c)(2) "preserves restrictions on a transfer of a spendthrift trust . . . ."). Rather than indicating that §541(c)(2) was intended to refer only to spendthrift trusts, these reports merely clarify that §541(c)(2) was intended to continue the exclusion of spendthrift trusts to the extent they are protected from creditors under applicable state law. *Ralstin, supra,* 61 Bankr. at 503; *Komet, supra,* 104 B.R. at 811 (stating that §541(c)(2), "far from expressing any particularly new congressional policy, . . . simply ratified long-standing prior law honoring state spendthrift trust law. Nothing more need be read into its enactment."); *see also Moore, supra,* 907 F.2d at 1479 (stating that "[a]t most, these passages suggest that Congress intended state spendthrift trust law to be included within the meaning of 'applicable nonbankruptcy law.'"). We agree with the reasoning of the Fourth Circuit in *Moore* and other courts following the minority opinion.

B.

Our next inquiry is whether ERISA contains an enforceable transfer restriction that would cause it to fall within the meaning of the term "applicable nonbankruptcy law." *See Moore, supra,* 907 F.2d at 1479. This determination requires an interpretation of two coordinate federal statutes -- ERISA and the Bankruptcy Code. Our analysis is therefore governed by another principle of statutory construction; namely that we must give full effect to both statutes. *Moore,* 907 F.2d at 1479 (citing *Morton v. Mancari,* 417 U.S. 535, 551, 94 S. Ct. 2474, 2483 (1974).

In *Connolly v. Pension Benefit Guaranty Corp.,* 475 U.S. 211, 106 S. Ct. 1018 (1986), the Supreme Court reviewed the legislative purpose of ERISA, stating:

> Congress enacted ERISA in 1974 to provide comprehensive regulation for private pension plans. In addition to prescribing standards for the funding, management, and benefit provisions of these plans, ERISA also established a system of pension benefit insurance. This "comprehensive and reticulated statute" was designed to ensure that employees and their beneficiaries would not be deprived of anticipated retirement benefits by the termination of pension plans before sufficient funds have been accumulated in the plans. . . . Congress wanted to guarantee that 'if a worker has been promised a defined pension benefit upon retirement -- and if he has fulfilled whatever conditions are required to obtain a vested benefit -- he will actually receive it.'"

Connolly, 475 U.S. at 214 (quoting *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.,* 467 U.S. 717, 720, 104 S. Ct. 2709 (1984) (citation omitted)). One of the means by which ERISA protects workers' pension benefits is through provisions against assignment or alienation of plan benefits.[9] 29 U.S.C. §1056(d)(1) states that "each pension plan shall provide that benefits provided under the plan may not be assigned or alienated." Likewise, 26 U.S.C. §401(a)(13) of the Internal Revenue Code requires that in order for an ERISA pension plan to receive tax-exempt status, it must provide that benefits under the plan may not be assigned or alienated. *See also* Treas. Reg. §1.403(a)-13(b)(1). Under §1056(d)(1) then, all encroachments, both voluntary and involuntary, are prohibited. *General Motors Corp. v. Buha,* 623 F.2d 455, 460 (6th Cir. 1980). Thus, a debtor's interest in an ERISA pension fund is beyond the reach of his general creditors. *Id.* at 463. We therefore find, as did the *Moore* and *Threewitt* courts, that "'[u]nder the plain and simple language of Section 541(c)(2), if the ERISA

anti-alienation provisions are enforceable against general creditors, they are enforceable against the bankruptcy trustee.'" *Moore,* 906 F.2d at 1480 (quoting *Threewitt, supra,* 24 Bankr. at 929).

This conclusion has several favorable results. First, it harmonizes the Bankruptcy Code, ERISA, and the Internal Revenue Code and gives full effect to the express language of those statutes. Second, it prevents a plan from being subject to disqualification and loss of tax-exempt status when a bankruptcy trustee seeks turnover of a single debtor's interest in a plan. *See Moore,* 907 F.2d at 1480. Finally, it guarantees uniform treatment of benefits throughout the country. As noted by this court in *Buha, supra:*

> It is central to the statutory scheme that ERISA not be subject to state and local laws which might frustrate its goals. This was emphasized by Representative Dent, Chairman of the Subcommittee on Labor of the House Committee on Education and Labor, who stated:
>
> > Finally, I wish to make note of what is to many the crowning achievement of this legislation, the reservation to Federal authority the sole power to regulate the field of employee benefit plans. With the preemption of the field, we round out the protection afforded participants by eliminating the threat of conflicting and inconsistent state and local regulation. 120 Cong. Rec. 29197 (1974).

623 F.2d at 459.

In light of our disposition of this case, we need not address the Plan's remaining arguments. For the reasons stated above, the judgment of the district court is REVERSED and REMANDED. The district court and/or the bankruptcy court is directed to make findings as to whether the Holiday Plan constitutes a pension plan within the meaning of 29 U.S.C. §1056(d)(1).

July 31, 1990, Argued January 14, 1991, Decided January 14, 1991, Filed

SUBSEQUENT HISTORY: As Corrected January 14, 1991.

FOOTNOTES TO TEXT

1 They are set forth in detail in the opinion of the bankruptcy court. *See In re Lucas,* 100 Bankr. 969 (Bankr. M.D. Tenn. 1989).

2 The parties and the lower courts treated the Holiday Plan as a pension plan. The issue was not briefed below.

3 The bankruptcy court's ruling on the latter issue is not contested by "the Plan".

4 The Bankruptcy Code also contains exemptions. Under section 522(b) of the Code, a debtor may choose between either a "federal" or "state" exemption system unless the individual state has exercised its authority to "opt out" of the federal exemption scheme. 11 U.S.C. §522(b)(1). If the individual state has opted-out of the federal scheme, the only exemptions available to the debtor are those created by the state. Tennessee is one of a substantial number of states which has opted-out of the federal scheme. *See* Tenn. Code Ann. §26-2-112; *Rhodes v. Stewart,* 705 F.2d 159, 162 (6th Cir.), *cert. denied,* 464 U.S. 963 (1983); *In re Sellers,* 107 Bankr. 152, 153 n.2 (Bankr. E.D. Tenn. 1989).

5 Exemptions available to a debtor under Tennessee law include the following:

> In addition to the property exempt under §26-2-102, the following shall be exempt from execution, seizure or attachment in the hands or possession of any person who is a bona fide citizen permanently residing in Tennessee:
>
> (1) The debtor's right to receive: . . . .
>
> (D) To the same extent that earnings are exempt pursuant to §26-2-106, a payment under a stock bonus, pension, profitsharing, annuity, or similar plan or contract on account of death, age or length of service, unless:
>
> (i) Such plan or contract was established by or under the auspices of an insider that employed the debtor at the time that the debtor's rights under such plan or contract arose;

> (ii) Such payment is on account of age or length of service; and
>
> (iii) Such Plan or contract does not qualify under Section 401(a), 403(a), 403(b), 408 or 409 of the Internal Revenue Code of 1954 (26 U.S.C. 401(a), 403(a), 403(b), 408 or 409).
>
> *Provided, however, that the assets of the fund or plan from which any such payments are made, or are to he made, are exempt only to the extent that the debtor has no right or option to receive them except as monthly or other periodic payments beginning at or after age fifty-eight (58). Assets of such funds or plans are not exempt if the debtor may, at his option, accelerate payment so as to receive payment in a lump sum or in periodic payments over a period of sixty (60) months or less.*

Tenn. Code Ann. §26-2-111 (1980) (emphasis added).

Specifically, the bankruptcy court held that because the Plan allowed a participant to receive loans up to the entire amount in the account, and to receive a lump sum payment of all the money in his or her account upon "lea[ving] the company, retir[ing] at or after age 55, or becoming permanently disabled," it failed the highlighted proviso of §26-2-111(1)(D), *supra,* and no Tennessee exemption was available. *Lucas,* 100 Bankr. at 971.

6 The bankruptcy court emphasized that the anti-garnishment statute at issue in *Mackey* applied to employee *welfare* benefit plans, which are not protected from garnishment by ERISA itself. Distinguishing the instant case, the court stated:

> The predicate for the pre-emption question in *Mackey* is not here present: there is no state exemption statute applicable to this debtor that might be pre-empted by ERISA.

Lucas, 100 Bankr. at 971.

7 The court provided the following illustrations:

> For example, 11 U.S.C. §1125(d) states that whether postpetition disclosure statements contain adequate information is "not governed by any otherwise

> applicable nonbankruptcy law," which includes, *inter alia,* federal securities law. *See In re Stanley Hotel, Inc.,* 13 B.R. 926, 31 (Bkrtcy.D.Colo. 1981). Again, 11 U.S.C. §108(a) extends the time in which a trustee can pursue a cause of action which the debtor could have pursued in accordance with the tolling provisions of "applicable nonbankruptcy law," which includes, *inter alia,* the Racketeer Influenced and Corrupt Organization Act. *See In re Ahead By a Length, Inc.,* 100 B.R. 157, 162-63 (Bkrtcy.S.D.N.Y. 1989).

Moore, 907 F.2d at 1477-78.

8 The *Moore* court gave the following examples:

> . . . 11 U.S.C. §109(c)(2) limits Chapter 9 filings to entities authorized to be such debtors under "State law"; 11 U.S.C. §522(b)(1) & (2) ties certain debtor's exemptions to "State law that is applicable"; and 11 U.S.C. §523(a)(5) denies discharge of any debt for support pursuant to an order "made in accordance with State or territorial law." *See also* 11 U.S.C. §§362(b)(12), 903(1), and 1145(a).

Moore, 907 F.2d at 1478.

9 By contrast, there is no federal statutory, or regulatory requirement that employee *welfare* benefit plans contain non-assignment or anti-alienation clauses. *Retirement Fund Trust of the Plumbing, Heating and Piping Industry of Southern California v. Franchise Tax Board,* 909 F.2d 1266, 1269 (9th Cir. 1990). As noted in *Mackey, supra,* Congress elected to provide protection from alienation for pension benefit plans, but not for welfare benefit plans. 486 U.S. at 836-37. The Court therefore inferred from Congress' silence that the legislature must have intended to allow attachment of welfare benefits plans. *Id.* Thus, an anti-alienation provision, if contained in a welfare benefit plan would not be enforceable since the welfare plan cannot create a protection excluded by Congress. *Retirement Fund Trust,* 909 F.2d at 1280.

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

In Re: ELIZABETH HAYES LUCAS, *Debtor,*

JANE B. FORBES, Trustee, *Plaintiff-Appellee,*

v.

ELIZABETH HAYES LUCAS AND HOLIDAY CORPORATION SAVINGS AND RETIREMENT PLAN, *Defendants,*

HOLIDAY CORPORATION SAVINGS AND RETIREMENT PLAN, *Appellant.*

Bankruptcy No. 386-05479.

Adv. No. 388-0143.

Civ. A. No. 3:89-0575.

October 17, 1989.

David J. Cocke, William C. Denton, Borod and Kramer, Memphis, Tenn., Jane B. Forbes, Franklin, Tenn., for plaintiff, appellee.

James Flexer, Nashville, Tenn., for defendants.

MEMORANDUM

MORTON, Senior District Judge.

This is an appeal from the memorandum and order entered by the Bankruptcy Judge on June 8, 1989, 100 B.R. 969, determining that Forbes as Trustee was entitled

to recover from the Holiday Corporation Savings and Retirement Plan certain sums of money which were contributed by Lucas to Holiday Corporation Savings and Retirement Plan, an ERISA qualified pension trust.

The opinion of the Bankruptcy Judge is incorporated herein as fully as if copied verbatim, is affirmed in its entirety, and is adopted by this court as the court's opinion and memorandum.

Forbes, the Trustee, seeks to assess costs and attorney fees to the defendant because of an alleged frivolous appeal on the question involved. Since there is substantial doubt concerning the principle of law involved in this case, the court determines that the appeal was not frivolous and therefore does not tax costs and attorney fees against the defendant.

An appropriate order will be entered dismissing the appeal in this case.

UNITED STATES BANKRUPTCY COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

IN RE: ELIZABETH HAYES LUCAS, Debtor.

JANE B. FORBES, TRUSTEE, Plaintiff,
v.

ELIZABETH HAYES LUCAS and HOLIDAY CORPORATION SAVINGS AND RETIREMENT PLAN, Defendants.

Bankruptcy No. 386-05479.

Adv. No. 388-0143.
June 9, 1989.

COUNSEL: Jane B. Forbes, Esq., Franklin, Tennessee, Attorney for Trustee.

Charles W. Broun, III, Esq., Holiday Corporation, Memphis, Tennessee, Attorney for Holiday Corporation Savings and Retirement Plan.

MEMORANDUM

KEITH M. LUNDIN, Bankruptcy Judge

The issues presented on cross-motions for summary judgment are: (1) whether *Mackey v. Lanier,* 486 U.S. ----, 100 L.Ed.2d 836, 108 S.Ct. 2182 (1988) upsets the Chapter 7 trustee's recovery of vested ERISA-qualified pension benefits that are not exempt under Tennessee or non-bankruptcy federal law; and (2) whether a pension fund is liable for benefits paid to the debtor after notice of the estate's claim. *Mackey* does not affect the trustee's

right to non-exempt pension benefits. The trustee can recover post-petition distributions from the debtor or the pension fund.

This is a core proceeding. 28 U.S.C.S. §157(b)(2)(A), (E) (Supp. 1988). The following are findings of fact and conclusions of law. Bankr.R. 7052.

I.

Debtor filed a voluntary Chapter 7 on December 22, 1986. Schedule B-4 listed a $2,000 exemption in a retirement fund not listed as an asset on Schedule B-2. An alert trustee inquired about the retirement fund by letter to debtor's attorney dated January 27, 1987. By letter dated January 30, 1987, Holiday Corporation was notified by the debtor's lawyer that "Jane B. Forbes, Chapter 7 Trustee" would be seeking information regarding the debtor's pension benefits. Associate General Counsel for Holiday, by letter dated February 20, 1987, acknowledged the interest of the Chapter 7 trustee and inquired of the debtor's attorney: "it would be very helpful to me if the situation giving rise to any further queries were explained." By letter from the trustee dated April 6, 1987, Holiday was informed:

> I am trustee in bankruptcy for the above individual. . . According to your letter, a certain percentage of the contributions vest and become 100% [sic] after eight (8) years [sic] service by the employee. Pursuant to 11 U.S.C. §542 and §543, I am requesting that you provide me with a complete accounting of amounts in Elizabeth Hayes Lucas' account with a breakdown as to the amounts that have vested and the amounts that are not vested. Should you have any questions or should you

> require a subpoena to provide me with this information, please advise me within the next ten (10) days.

Holiday's counsel responded on April 20, 1987 advising that $5,863.08 was vested as of January, 1987. In April and again in May, the trustee notified the attorney for the debtor that the "vested" pension benefits were property of the bankruptcy estate. The debtor requested withdrawals from Holiday of $1,500 on April 16, 1987, $1,161.13 on May 7, 1987 and $4,829.98 on August 24, 1987.

The trustee filed this complaint against the debtor and Holiday[1] to recover that portion of the vested pension benefits paid to the debtor post-petition exceeding the $2,000 personal property exemption claimed pursuant to TENN. CODE ANN. §26-2-102 (1980).[2]

II.

It is conceded that the Holiday Corporation Savings and Retirement Plan is not a spendthrift trust under Tennessee law, thus, the debtor's vested pension benefits became property of the bankruptcy estate at filing on December 22, 1986. *In re Ridenour,* 45 Bankr. 72, 78 (Bankr. E.D. Tenn. 1984) ("Congress intended to exclude from the debtor's estate under §541(c)(2) only those ERISA-qualified pension plans which also constitute valid spendthrift trusts under relevant state law."). *See also In re Faulkner,* 79 B.R. 362 (Bankr. E.D. Tenn. 1987).

Tennessee has enacted exemptions pertaining to pension benefits.[3] TENN. CODE ANN. §26-2-111 provides in part:

In addition to the property exempt under §26-2-102, the following shall be exempt from execution, seizure or attachment in the hands or possession of any person who is a bona fide citizen permanently residing in Tennessee:

(1) The debtor's right to receive:

* * * * * *

(D) To the same extent that earnings are exempt pursuant to §26-2-106, a payment under a stock bonus, pension, profitsharing, annuity, or similar plan or contract on account of death, age, or length of service, unless:

(i) Such plan or contract was established by or under the auspices of an insider that employed the debtor at the time that the debtor's rights under such plan or contract arose;

(ii) Such payment is on account of age or length of service; and

(iii) Such plan or contract does not qualify under Section 401(a), 403(a), 403(b), 408, or 409 of the Internal Revenue Code of 1954 (26 U.S.C. 401(a), 403(a), 403(b), 408, or 409).

"Provided, however, that the assets of the fund or plan from which any such payment are made or are to be made, are exempt only to the extent that the debtor has no right or option to receive them except as monthly or other periodic payments beginning at or after age fifty-eight (58). Assets of such funds or plans

are not exempt if the debtor may, at his option, accelerate payment so as to receive payment in a lump sum or in periodic payments over a period of sixty (60) months or less."

TENN. CODE ANN. §26-2-111 (1980) (emphasis added).

The debtor's pension benefits are not subject to exemption under §26-2-111 because the debtor has access to vested benefits greater than that permitted by the highlighted proviso. The Holiday Corporation Savings and Retirement Plan dated June, 1987 provides: "[O]ne of the most important features of our savings and retirement plan is that you can borrow money from your account. When you take out a loan, you borrow your own money." The minimum amount a participant can borrow is $500 and the maximum depends on the vested money available in the account. Participants may have two loans outstanding if one loan was made to acquire or build a home. The plan allows hardship withdrawals: "If you need money because you or a family member have big medical bills or need to finance a home or a college education, you can apply for a hardship withdrawal of your before tax savings." A participant "can receive all the vested money . . . when you: leave the company, retire at or after age 55, or become permanently disabled." Leaving the company includes voluntary termination. Since the Holiday plan fails the proviso of §26-2-111(1)(D), there is no Tennessee exemption available to the debtor to defeat recovery of the debtor's benefits for the bankruptcy estate, net of the $2,000 conceded by the trustee. *See In re Clark,* 18 B.R. 824 (Bankr. E.D. Tenn. 1982) (analysis of §26-2-111(1)(D)).

Mackey does not change this result. In *Mackey*, the Supreme Court considered a Georgia statute that prohibited garnishment of employee *welfare* benefits. The Supreme Court concluded that ERISA pre-empted state anti-assignment or anti-alienation of ERISA-qualified welfare plan benefits. Because there was no protection in ERISA for garnishment of welfare benefits, Georgia could not enact a statute that prohibited garnishment. The predicate for the pre-emption question in *Mackey* is not here present: There is no state exemption statute applicable to this debtor that might be pre-empted by ERISA.

III.

The trustee can avoid the post-petition transfers of pension benefits to the debtor and recover the amounts transferred.

11 U.S.C.S. §549(a) provides:

> (a) Except as provided in subsection (b) or (c) of this section, the trustee may avoid a transfer of property of the estate---
>
> (1) that occurs after the commencement of the case; and
>
> (2)(A) that is authorized only under section 303(f) or 542(c) of this title; or
>
> (B) that is not authorized under this title or by the court.

11 U.S.C.S. §549(a) (1986).

This petition was filed in December of 1986. The debtor's vested pension benefits were property of the bankruptcy estate. 11 U.S.C.S. §541(a) (1986). The debtor demanded and received payments of pension benefits from Holiday on April 16, 1987, May 7, 1987 and August 24, 1987. Each payment of benefits was a transfer of property of the estate. 11 U.S.C.S. §101(50) (Supp. 1988). These transfers were not authorized by title 11, were not authorized by this court, nor did the debtor make any attempt to obtain court authorization, notwithstanding that debtor's counsel was aware of the trustee's assertion of rights in the pension benefits at least as early as January 30, 1987--nearly three months before the debtor's first withdrawal.

Upon avoidance of a transfer under §549, 11 U.S.C.S. §550(a)(1) authorizes the trustee to recover, for the benefit of the estate, "the property transferred, or, if the court so orders, the value of such property, from (1) the initial transferee of such transfer . . ." 11 U.S.C.S. §550(a)(1) (1986). The debtor is the initial transferee of transfers of pension benefits avoidable under §549.

The debtor had an affirmative duty to surrender property of the estate to the trustee and to assist the trustee in administration of the estate. 11 U.S.C.S. §521 (1986). Through counsel, the debtor was fully informed that the trustee claimed the pension benefits. In complete disregard of the debtor's duties, and in violation of the automatic stay,[4] the debtor demanded and received property of the estate from Holiday. Section 550(a)(1) entitles the trustee to recover from the debtor the avoidable post-petition transfers of pension benefits.

IV

11 U.S.C.S. §542(a) required Holiday to turn over to the trustee the debtor's vested benefits and entitles the trustee to recover from Holiday the benefits wrongfully paid to the debtor. The statutory protection in §542(c) is not available to Holiday.

11 U.S.C.S. §542 provides in part:

> a) Except as provided in subsection (c) or (d) of this section, *an entity,* other than a custodian, *in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under section 363 of this title*, or that the debtor may exempt under section 522 of this title, *shall deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate.*
>
> * * * * * *
>
> (c) Except as provided in section 362(a)(7) of this title, an entity that has *neither actual notice nor actual knowledge* of the commencement of the case concerning the debtor may transfer property of the estate, or pay a debt owing to the debtor in good faith and other than in the manner specified in subsection (d) of this section, to an entity other than the trustee, with the same effects as to the entity making such transfer or payment as if the case under this title concerning the debtor had not been commenced.

11 U.S.C.S. §542(a) and (c) (1986) (emphasis added).

Holiday Corporation Savings and Retirement Plan is an "entity." 11 U.S.C.S. §101(14). Holiday is not a "custodian." 11 U.S.C.S. §101(10) (1985). Holiday was in possession of property of the estate--vested pension benefits--that the trustee could use under §363 of the Code. The debtor's vested pension benefits were not of inconsequential value. Under §542(a), Holiday had a statutory duty to deliver the debtor's vested benefits to the trustee.

The protection of transferors in 11 U.S.C.S. §542(c) is not available to Holiday because the plan had notice of this bankruptcy case and of the trustee's interest in the debtor's benefits. By letters to and from counsel for Holiday dated January 30, 1987, February 20, 1987, April 6, 1987, etc., Holiday was informed of the bankruptcy filing, aware of the trustee's interest in the debtor's pension benefits and fully on notice as contemplated in §542(c).

Holiday argues that actual notice or knowledge is insufficient to forfeit the protection in §542(c) because the bankruptcy trustee failed to make demand upon the plan for payment of the debtor's benefits. There is no support for Holiday's assertion of an "actual demand" requirement in §542(c)--the section is worded in terms of notice and knowledge-Holiday had both. "There is no requirement in the Code that the trustee make demand, obtain a court order, or take any further action in order to obtain a turn over of the estate's property. Failure of an entity to do so, after notice of the estate's interest in property held by it, is probably contemptuous." *Fitzgerald v. Internal Revenue Service (Matter of Larimer),* 27 B.R. 514, 516 (Bankr. D. Idaho 1983). *See also Borock v. Bidlofsky (In re Bidlofsky),* 57 B.R. 883, 900 (Bankr. E.D. Mich. 1985). Moreover, the correspondence with Holiday

by debtor's counsel and by the trustee are tantamount to actual demand in that no reasonable reader of these letters could conclude anything but that the trustee asserted a right to the debtor's vested benefits.

Holiday argues it would be inequitable to require it to twice pay the monies paid to the debtor. Holiday would graft on to §542(c) an equitable exception to what is already the statutory codification of an equitable exception announced by the Supreme Court in *Bank of Marin v. England,* 385 US. 99, 87 S.Ct. 274, 17 L.Ed.2d 197 (1966). Under the former Bankruptcy Act, §70(d), 11 U.S.C.S. §110, defined the protections afforded transfers of property to, by or on behalf of a bankrupt. Clause five of §70(d) stipulated "except as otherwise provided in this subdivision and in subdivision (g) of §21 of this Act, no transfer by or in behalf of the bankrupt after the date of bankruptcy shall be valid against the trustee." In *Bank of Marin* a divided Supreme Court identified an additional "equitable" exception, holding that it would be inequitable to require a drawee bank to compensate the trustee for paying checks that were issued by a bankrupt prior to filing and presented to and honored by the bank after adjudication where the bank had no notice of the bankruptcy case. A version of the *Bank of Marin* "no notice" exception to the recovery of certain transfers of property of the estate was codified as §542(c) of the 1978 Reform Act. Holiday had actual notice. It is not entitled to broader relief than that codified in §542(c).

An appropriate order will be entered.

ORDER

For the reasons stated in the memorandum filed contemporaneously herewith, IT IS ORDERED,

ADJUDGED and DECREED that the trustee's motion for summary judgment is granted.

IT IS SO ORDERED.

FOOTNOTES TO TEXT

1 At one point in this proceeding, Holiday argued that the trustee named the wrong defendant. Indeed, "Holiday Corporation" is not the transferor of the pension benefits. Holiday Corporation Savings and Retirement Plan is the proper defendant and has appeared through counsel. Holiday does not argue that it is immune from this suit under ERISA. *See Mackey,* 486 U.S. at ----, 108 S.Ct. at 2186, 100 L.Ed.2d at 845. *et seq.*

2 The trustee does not contest the debtor's entitlement to use the general personal property exemption in §26-2-102, thus I need not determine whether *Mackey* affects the use of TENN. CODE ANN. §26-2-102 to exempt ERISA-qualified pension benefits. *See Mackey,* 486 U.S. at ----, 108 S. Ct. at 2185, 100 L.Ed.2d at 844 *et seq.* The debtor does not claim that ERISA itself would protect these pension benefits from the bankruptcy trustee and the debtor claims no non-bankruptcy federal exemption under 11 U.S.C.S. §522(b)(2)(A) (1986). *See In re Graham,* 726 F.2d 1268 (8th Cir. 1984); *In re Goff,* 706 F.2d 574 (5th Cir. 1983); *In re Lichstrahl,* 750 F.2d 1488 (11th Cir. 1985); *In re Daniel,* 771 F.2d 1352 (9th Cir. 1985).

3 Exemptions are determined at the date of the bankruptcy petition. *See In re Ridenour,* 45 Bankr. at 80. Neither the trustee nor Holiday argues that the amendment to §26-2-104(b) which took effect July 1, 1988 is applicable to this case. TENN. CODE ANN. §26-2-104(b) (Supp. 1988).

4 11 U.S.C.S. §362(a)(3) prohibits any entity "to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate." 11 U.S.C.S. §362(a)(3) (1985). This individual Chapter 7 debtor is an entity for purposes of §362. *See* 11 U.S.C.S. §§101(35) and 101(14) (Supp. 1988).

A) Bankruptcy Code Provisions.

11 U.S.C. §541 provides in relevant part:

> §541. Property of the estate
>
> (a) The commencement of a case under section 301, 302, or 303 of this title [11 USCS §301, 302, or 303] creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:
>
> > (1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.
>
> (c)(1) Except as provided in paragraph (2) of this subsection, an interest of the debtor in property becomes property of the estate under subsection (a)(1), (a)(2), or (a)(5) of this section notwithstanding any provision in an agreement, transfer instrument, or applicable nonbankruptcy law--
>
> > (A) that restricts or conditions transfer of such interest by the debtor; or
> >
> > (B) that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title [11 USCS §§101 et seq.], or on the appointment of or taking possession by a trustee in a case under this title [11 USCS §§101 et seq.] or a

custodian before such commencement, and that effects or gives an option to effect a forfeiture, modification, or termination of the debtor's interest in property.

(2) A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title [11 USCS §§101 et seq.]

11 U.S.C. §522 provides in relevant part:

11 USCS §522. Exemptions

(b) Notwithstanding section 541 of this title [11 USCS §541], an individual debtor may exempt from property of the estate the property listed in either paragraph (1) or, in the alternative, paragraph (2) of this subsection. In joint cases filed under section 302 of this title [11 USCS §302] and individual cases filed under section 301 or 303 of this title [11 USCS §301 or 303] by or against debtors who are husband and wife, and whose estates are ordered to be jointly administered under Rule 1015(b) of the Bankruptcy Rules [USCS Bankruptcy Rules, Rule 1015(b)], one debtor may not elect to exempt property listed in paragraph (1) and the other debtor elect to exempt property listed in paragraph (2) of this subsection. If the parties cannot agree on the alternative to be elected, they shall be deemed to elect paragraph (1), where such election is permitted under the law of the

jurisdiction where the case is filed. Such property is--

(1) property that is specified under subsection (d) of this section, unless the State law that is applicable to the debtor under paragraph (2)(A) of this subsection specifically does not so authorize; or, in the alternative,

(2)(A) any property that is exempt under Federal law, other than subsection (d) of this section, or State or local law that is applicable on the date of the filing of the petition at the place in which the debtor's domicile has been located for the 180 days immediately preceding the date of the filing of the petition, or for a longer portion of such 180-day period than in any other place; and

(B) any interest in property in which the debtor had, immediately before the commencement of the case, an interest as a tenant by the entirety or joint tenant to the extent that such interest as a tenant by the entirety or joint tenant is exempt from process under applicable nonbankruptcy law.

(d) The following property may be exempted under subsection (b)(1) of this section:

(10) The debtor's right to receive--

(E) a payment under a stock bonus, pension, profitsharing, annuity, or similar plan or contract on account of

> illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor, unless--
>
> > (i) such plan or contract was established by or under the auspices of an insider that employed the debtor at the time the debtor's rights under such plan or contract arose;
> >
> > (ii) such payment is on account of age or length of service; and
> >
> > (iii) such plan or contract does not qualify under section 401(a), 403(a), 403(b), 408, or 409 of the Internal Revenue Code of 1954 (26 U.S.C. 401(a), 403(a), 403(b), 408, or 409) [26 USCS 401(a), 403(a), (b), 408, or 409].

B. ERISA Provisions

The Employee Retirement Income Security Act ("ERISA") provides in 29 U.S.C. §1056(d)(1) in relevant part:

> §1056. Form and payment of benefits
>
> > (d) Assignment or alienation of plan benefits.
> > (1) Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.

> (2) For the purpose of paragraph (1) of this subsection, there shall not be taken into account any voluntary and revocable assignment of not to exceed 10 percent of any benefit payment, or of any irrevocable assignment or alienation of benefits executed before the date of enactment of this Act [enacted Sept. 2, 1974]. The preceding sentence shall not apply to any assignment or alienation made for the purposes of defraying plan administration costs. For purposes of this paragraph a loan made to a participant or beneficiary shall not be treated as an assignment or alienation if such loan is secured by the participant's accrued nonforfeitable benefit and is exempt from the tax imposed by section 4975 of the Internal Revenue Code of 1986 [26 USCS §4975] (relating to tax on prohibited transactions) by reason of section 4975(d)(1) of such Code [26 USCS §4975(d)(1).

ERISA also provides in 29 U.S.C. §1144 in relevant part:

> §1144. Other laws
>
> (a) Supersedure; effective date. Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) [29 USCS §1003(a)] and not exempt

under section 4(b) [29 USCS §1003(b)]. This section shall take effect on January 1, 1975.

(d) Alteration, amendment, modification, invalidation, impairment, or supersedure of any law of the United States prohibited. Nothing in this title shall be construed to alter, modify, invalidate, impair or supersede any law of the United States (except as provided in sections 111 and 507(b) [29 USCS §§1031, 1137(b)]) or any rule or regulation issued under any such law.

C. Tennessee Statutory Provisions.

T.C.A. 26-2-112 (1980) provides in relevant part:

26-2-112. Exemptions for the purpose of bankruptcy. - The personal property exemptions as provided for in this part, and the other exemptions as provided in other sections of the Tennessee Code Annotated for the citizens of Tennessee, are hereby declared adequate and the citizens of Tennessee pursuant to section 522 (b) (1), Public Law 95-598 known as the Bankruptcy Reform Act of 1978. Title 11 USC, section 522(b) (1), are not authorized to claim as exempt the property described in the Bankruptcy Reform Action 1978, 11 USC 522(d). [Acts 1980 (Adj. S.), ch. 919 §4; T.C.A., §26- 901].

At the time of the filing of the Debtor's bankruptcy petition (December 22, 1986), T.C.A. §26-2-104 provided in relevant part:

> 26-2-104. State pension moneys exempt. - All moneys received by a resident of the state, as pension from the state of Tennessee, or any subdivision or municipality thereof, before receipt, or while in his hands or upon deposit in the bank, shall be exempt from execution, attachment or garnishment, whether such pensioner is the head of a family or not. [Acts 1978 (Ads. S.), ch. 915, §7; T.C.A., §26-206.]

After the filing of the Debtor's bankruptcy petition, T.C.A. §26- 2-104 was amended and provided in relevant part:

> 26-2-104. State pension moneys, certain retirement plan funds or assets, exempt. -
>
> (a) All moneys received by a resident of the state, as pension from the state of Tennessee, or any subdivision or municipality thereof, before receipt, or while in his hands or upon deposit in the bank, shall be exempt from execution, attachment or garnishment other than an order for assignment of support issued under §36-5-501, whether such pensioner is the head of a family or not.
>
> (b) Except as provided in subsection (c), any funds or other assets payable to a participant or beneficiary from, or any interest of any participant or beneficiary in, a retirement plan which is qualified

> under §§401(a), 403(a), 403(b), and 408 of the federal Internal Revenue Code of 1986, as amended, are exempt from any and all claims of creditors of the participant or beneficiary, except the state of Tennessee. All records of the debtor concerning such plan and of the plan concerning the debtor's participation in the plan, or interest in the plan, are exempt from the subpoena process.
>
> (c) Any plan or arrangement described in subsection (b), except a public plan under subsection (a), is not exempt from the claims of an alternate payee under a qualified domestic relations order. However, the interest of any and all alternate payees under a qualified domestic relations order are exempt from any and all claims of any creditor, other than the state of Tennessee. As used in this subsection, "alternate payee" and "qualified domestic relations order" have the meaning ascribed to them in §414(p) of the federal Internal Revenue Code of 1986, as amended. [Acts 1978, ch. 915 §7; T.C.A., §26-206; Acts 1986, ch. 890, §8; Acts 1988, ch. 854, §1.]

T.C.A. §26-2-111 provides in relevant part:

> 26-2-111. Additional exemptions - Certain benefits payments -Awards - Tools of trade - Health care aids. - In addition to the property exempt under §26-2-102, the following shall

be exempt from execution, seizure or attachment in the hands or possession of any person who is a bona fide citizen permanently residing in Tennessee:

(1) The debtor's right to receive:

(D) To the same extent that earnings are exempt pursuant to §26-2-106, a payment under a stock bonus, pension, profit sharing, annuity, or similar plan or contract on account of death, age or length of service, unless:

(i) Such plan or contract was established by or under the auspices of an insider that employed the debtor at the time that the debtor's rights under such plan or contract arose;

(ii) Such payment is on account of age or length of service; and

(iii) Such plan or contract does not qualify under Section 401 (a), 403(a), 403(b), 408 or 409 of the Internal Revenue Code of 1954 (26 U.S.C. 401(a), 403(a), 403(b), 408 or 409).

Provided, however, that the assets of the fund or plan from which any such payments are made, or are to be made, are exempt only to the extent that the debtor has no right or option to receive them except as monthly or other periodic payments beginning at or after age fifty-eight (58). Assets of such funds or plans are not exempt if the debtor may, at his option, accelerate payment so as to receive payment in a lump sum or in periodic payments over a period of sixty (60) months or less."

D. Internal Revenue Code Provisions.

26 U.S.C. §401(a)(13)(A)(Supp. 1986) provides in relevant part:

> Sec. 401. Qualified pension, profit-sharing, and stock bonus plans.
>
> (a) Requirements for qualification.
>
> A trust created or organized in the United States and forming part of a stock bonus, pension, or profit-sharing plan of an employer for the exclusive benefit of his employees or their beneficiaries shall constitute a qualified trust under this section---
>
> (13) Assignment and alienation
>
> (A) In general. A trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that benefits provided under the plan may

not be assigned or alienated. For purposes of the preceding sentence, there shall not be taken into account any voluntary and revocable assignment of not to exceed 10 percent of any benefit payment made by any participant who is receiving benefits under the plan unless the assignment or alienation is made for purposes of defraying plan administration costs. For purposes of this paragraph a loan made to a participant or beneficiary shall not be treated as an assignment or alienation if such loan is secured by the participant's accrued nonforfeitable benefit and is exempt from the tax imposed by section 4975 (relating to tax on prohibited transactions) by reason of section 4975(d)(1). This paragraph shall take effect on January 1, 1976 and shall not apply to assignments which were irrevocable on September 2, 1974.
